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## Proposed Regulation Agency Background Document

<b>Agency name</b>	Virginia Pesticide Control Board
<b>Virginia Administrative Code (VAC) citation</b>	2 VAC 20 -51
<b>Regulation title</b>	Regulations Governing Pesticide Applicator Certification Under Authority of Virginia Pesticide Control Act
<b>Action title</b>	Amend
<b>Date this document prepared</b>	July 28, 2006

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 21 (2002) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

### Brief summary

*In a short paragraph, please summarize all substantive changes that are being proposed in this regulatory action.*

Substantive changes being proposed in this regulatory action include: adding new definitions to clarify who must be certified and keep pesticide application records; adding new definitions to clarify the required supervision standard for people training to become applicators; adding categories and/or subcategories of pesticide applicators; establishing minimum standards for on the job training for Registered Technicians when working in different categories or subcategories; establishing a time frame within which a person would have to finish training and take the registered technician examination; eliminating the provision allowing businesses or agencies to proctor the registered technician examination to their own employees; and requiring applicators not for hire to keep records of all pesticides applied (not just those that are restricted use).

## Legal basis

*Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., the agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.*

The basis for this regulation is §3.1-249.30.4., §3.1-249.30.5, §3.1-249.30.8., §3.1-249.30.9., §3.1-249.51.A., §3.1-249.51.B., §3.1-249.52.A, §3.1-249.52.B, §3.1-249.53.A, §3.1-249.53.B., §3.1-249.53.C., §3.1-249.54.A., § 3.1-249.55, and § 3.1-249.56 of the Code of Virginia. Specifically, §3.1-249.30.9. authorizes the Board to adopt regulations that may be necessary to carry out the purposes of the Virginia Pesticide Control Act. §3.1-249.51.B. authorizes the Board to specify by regulation the amount of training, which may include a period of service, required to qualify a person for each classification or subclassification of certification as a commercial applicator or registered technician. §3.1-249.52.A. prohibits anyone, except growers of agricultural commodities trading personal services, from applying pesticides of any kind for compensation of any kind, without first obtaining certification as either a commercial applicator or registered technician in accordance with regulations promulgated by the Board. In addition, §3.1-249.53.A. requires all state agencies, municipal corporations or other governmental agencies to be subject to the provisions of the Virginia Pesticide Control Act (Act) and regulations adopted under the Act. §3.1-249.54.A. requires growers of agricultural commodities to be certified according to regulations promulgated by the Board in order to apply restricted use pesticides (RUP). Lastly, § 3.1-249.55. authorizes the Board to provide for the biennial payment of commercial applicator and registered technician certificate renewal fees. Lastly, § 3.1-249.56.A. requires, through regulations of the Board, the reporting of pesticide accidents, incidents, or loss.

## Purpose

*Please explain the need for the new or amended regulation by (1) detailing the specific reasons why this regulatory action is essential to protect the health, safety, or welfare of citizens, and (2) discussing the goals of the proposal, the environmental benefits, and the problems the proposal is intended to solve.*

The regulation is necessary to protect health, safety and welfare of citizens because it ensures that those individuals applying pesticides are properly trained so that they may apply pesticides in a manner that will not harm themselves, other people or the environment. Also, by requiring the training and certification of pesticide applicators, citizens are able to save considerable money in that necessary pesticide applications are made using only the amounts required to control targeted pests.

By requiring applicators not for hire to record the uses of all pesticides applied it will be easier to determine, during investigations of complaints of misuse of pesticides, whether

the pesticides were applied according to the label and law. Currently, records are required only for the use of restricted use pesticides.

Removing the provision that currently allows for businesses to give (proctor) examinations to their employees seeking certification as Registered Technicians will eliminate an opportunity for fraud by some proctors thereby helping to ensure that only qualified applicators are applying pesticides on citizen's property. Also, requiring Registered Technicians to receive on the job training in each of the categories or subcategories in which they plan to work will help ensure the safety and welfare of Virginia's citizens. Currently, once a person has received 20 hours of on the job training in one category or subcategory, they are not mandated to receive any training at all in another category prior to applying pesticides. A lack of knowledge of associated pest control strategies and environmental hazards carries the potential for personal health and environmental hazards.

## Substance

*Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. (More detail about these changes is requested in the "Detail of changes" section.)*

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Substantive changes to existing sections include:

1. Add language making some definitions easier to read and clarifying the meaning of a not-for-hire applicator and the requirements of such applicators to keep records of pesticide applications.
2. Add a definition of a "competent person" on the advice of the Attorney General's office
3. Delete definitions that are not used in the regulations.
4. Add language to clarify the type of supervision required for people training to become certified applicators and registered technicians.
5. Add language to bring the regulation into compliance with the Virginia Pesticide Control Act as it relates to daycare center not-for-hire applicators.
6. Add language stating the exact application process for pesticide applicators, including the payment of appropriate fees.
7. Add language to clarify the training necessary for Registered Technicians when applying pesticides in more than one category activity.
8. Add language to ensure that applicators cannot apply pesticides unless they have been certified in a particular category.

9. Amending language to better state the conditions under which an illiterate person might be granted a certificate.
10. Add language to require registered technician applicants to complete the process of training and testing within an accepted time frame as well as making the process easier to understand.
11. Delete language that currently allows businesses and agencies to proctor their own Registered Technician examinations.
12. Add language to clarify the conditions required for certification of applicators applying paint containing pesticides.
13. Add language to allow the Board to designate additional categories of commercial applicators to meet federal mandates.
14. Add language clarifying what adverse effects need to be reported.
15. Add language to make the process for suspending a certificate for non-payment of a civil penalty more easily understood.
16. Add language to clarify what data needs to be reported in the case of pesticide accidents and incidents.

### Issues

*Please identify the issues associated with the proposed regulatory action, including:*

- 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;*
- 2) the primary advantages and disadvantages to the agency or the Commonwealth; and*
- 3) other pertinent matters of interest to the regulated community, government officials, and the public.*

*If the regulatory action poses no disadvantages to the public or the Commonwealth, please so indicate.*

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The advantages of the amendments include: (1) the regulation will be easier to read and understand for the industry and the regulators; (2) requirements for supervision and training of applicators and registered technicians will be easier to understand by the public and industry and will help ensure that only knowledgeable people will be applying pesticides; (3) record keeping requirements will be implemented to assist the public and the agency in determining whether or not pesticides have been applied according to label directions.

There are no disadvantages to the public or the Commonwealth of Virginia.

### Requirements more restrictive than federal

*Please identify and describe any requirement of the proposal which are more restrictive than applicable federal requirements. Include a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements or no requirements that exceed applicable federal requirements, include a statement to that effect.*

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The proposed amendments to the certification regulation are somewhat more restrictive than the federal mandate because The Virginia Pesticide Control Act, as promulgated by the General Assembly and signed by the Governor, establishes requirements to ensure that citizens of Virginia and Virginia's environment are protected wherever pesticides are applied. The certification regulation is not more restrictive than required by the Virginia Pesticide Control Act (§§ 3.1-249.27-3.1-249.78 of Code of Virginia (1950) as amended). Federal law requires that any person using restricted use pesticides (any pesticide classified for restricted use by the Administrator of the United States Environmental Protection Agency) be certified. The certification regulation regulates the application of restricted use pesticides by private pesticide applicators (an applicator who uses or supervises the use of any pesticide which is classified for restricted use for the purposes of producing any agricultural commodity), as well as the application of general use (any pesticide classified as general use by the Administrator of the United States Environmental Protection Agency) and restricted use pesticides by commercial pesticide applicators (an applicator who uses or supervises the use of any pesticide for any purpose, or on any property for compensation) and specific types of commercial pesticide applicators-not-for-hire (a commercial pesticide applicator who uses or supervises the use of pesticides as part of his duties only on property owned or leased by him or his employer). In compliance with the 1995 amendments to the Virginia Pesticide Control Act (§§ 3.1-249.27- 3.1-249.78 of the Code of Virginia (1950) as amended), one of the proposed amendments clarifies when a class of commercial pesticide applicators-not-for-hire, using general use pesticides, must be certified, specifically day-care facility employees.

### Localities particularly affected

*Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.*

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No locality would bear any identifiable, disproportionate material impact as a result of the proposed amendments.

### Public participation

*Please include a statement that in addition to any other comments on the proposal, the agency is seeking comments on the costs and benefits of the proposal and the impacts of the regulated community.*

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In addition to any other comments, the board/agency is seeking comments on the costs and benefits of the proposal and the potential impacts of this regulatory proposal. Also, the agency/board is seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include 1) projected reporting, recordkeeping and other administrative costs, 2) probable effect of the regulation on affected small businesses, and 3) description of less intrusive or costly alternative methods of achieving the purpose of the regulation. The agency/board seeks comments

particularly on the proposed text in 2 VAC 20-51-50.A.4 regarding testing of applicants for the registered technician certification.

Anyone wishing to submit written comments may do so by mail, email or fax to W. Wayne Surles, Program Manager, P.O. Box 1163, Richmond, VA 23218, email to [wayne.surles@vdacs.virginia.gov](mailto:wayne.surles@vdacs.virginia.gov), fax (804) 786-9149. Written comments must include the name and address of the commenter. In order to be considered comments must be received by the last date of the public comment period.

**Economic impact**

*Please identify the anticipated economic impact of the proposed regulation.*

<p><b>Projected cost to the state to implement and enforce the proposed regulation, including (a) fund source / fund detail, and (b) a delineation of one-time versus on-going expenditures</b></p>	<p>Two sections of the amended regulation are expected to have an on-going cost to the state: the elimination of the option for commercial applicators to proctor exams for their employees and the required reporting of additional category training for registered technicians. If all registered technician exams currently being proctored are instead administered through the Department of Motor Vehicles, the program will incur an additional cost of \$2,000 per year for testing fees. However, this cost should be offset by the improved efficiency of no longer having to process 1,000 paper test forms or administer a program that has overseen as many as 500 proctors.</p> <p>The training reporting requirement is anticipated to result in additional processing of no more than 600 single-page forms, at a cost of \$115 to scan and index the forms received, per year. (Funding Source 09, Funding detail 01)</p>
<p><b>Projected cost of the regulation on localities</b></p>	<p>The only localities likely to be affected by these regulatory changes are those which have their own employees certified to apply pesticides. In the case of the discontinuation of the proctor program 16 localities are expected to be affected minimally by having employees test with the local DMV or Extension offices, rather than in their employer's office. The requirement to keep records of all pesticide applications is also likely to have a minimal cost, since surveys of the programs indicate that most already keep such records. The requirement to provide and report training when a registered technician is shifted into another category of pesticide application is projected to cost affected localities an average of \$150 per year.</p>
<p><b>Description of the individuals, businesses or other entities likely to be affected by the regulation</b></p>	<p>Entities subject to this regulation include certified commercial pesticide applicators and registered technicians, both for-hire and not-for-hire; pesticide businesses; and governmental agencies that have employees certified to apply pesticides.</p>
<p><b>Agency's best estimate of the number of such</b></p>	<p>The repeal of the registered technician exam</p>

<p><b>entities that will be affected. Please include an estimate of the number of small businesses affected.</b> Small business means a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.</p>	<p>proctor option is likely to affect the 265 commercial applicators that are currently approved as proctors and the businesses and governmental agencies for which they provide this service. In addition it will affect the estimated 1,000 registered technicians per year who would no longer have the option to be examined in their workplace. All of these would fit the definition of small business as defined by the Code.</p> <p>The addition of defined training requirements and reporting for registered technicians who are shifted into another category of pesticide application is estimated to affect no more than 600 registered technicians per year (10% of the 6,000 registered technicians).</p> <p>The requirement for not-for-hire applicators to keep records of all pesticide applications is estimated to affect no more than 225 not-for-hire and governmental pesticide applicators (5% of the 4,500 applicators in these two classes.) (A sample of applicators in this circumstance contacted indicated that they already keep records of all applications due to both liability and inventory control concerns.)</p>
<p><b>All projected costs of the regulation for affected individuals, businesses, or other entities. Please be specific. Be sure to include the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses.</b></p>	<p>The repeal of the option to take a written exam administered by the employer is expected to add one hour of travel and processing time to the testing time of each of the projected 1,000 applicants who might have opted for a proctored exam. At an estimated cost of \$10 per hour, this would result in an impact of \$10,000, divided between the 265 entities that currently utilize proctors, for an average cost of \$38. (The impact on any one organization will of course be affected by the number of applicants an organization has in a year.)</p> <p>The addition of defined training requirements and reporting for registered technicians who are shifted into another category of pesticide application is estimated to affect no more than 600 registered technicians per year, at an estimated cost of \$150 per technician for the additional training and reporting, for a total of \$90,000.</p> <p>The requirement for not-for-hire applicators to keep records of all pesticide applications is estimated to affect no more than 225 not-for-hire and governmental pesticide applicators. Applicators in these classes make applications only to their employer's property, so fewer applications and records would be needed than for the for-hire class. Assuming 50 applications are made per year, and records can be generated at a cost of \$.17 per record, a total cost of \$1,912.50 would be expected.</p>

## Alternatives

*Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in §2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulation.*

An alternative to maintaining the existing certification regulation would be to cede the authority to certify pesticide applicators to the U. S. EPA. This alternative was rejected because the regulated community would prefer to work with State officials in regulatory matters rather than federal officials. The alternative of letting commercial applicators continue to proctor the registered technician exam for their employees was considered to be a threat to the integrity and security of the certification process. One alternative to the defined subject matter training requirements for registered technicians moving into applications in another category would be to set specific hourly training requirements. This was considered to be impractical and more burdensome to the regulated community.

## Regulatory flexibility analysis

*Please describe the agency's analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.*

Under the Purpose section above, health, safety, environmental, and economic welfare issues were discussed. Primarily, the certification program ensures through education and testing, that pesticides, when applied, are done so by those individuals that have requisite knowledge to avoid adverse impacts to the health of individuals, the environment, and the economy of both property owners and governmental entities. This certification program is common to most U.S. states. In fact, this similarity permits Virginia to enter into reciprocal agreements with other states to allow Virginia pesticide applicators to apply pesticides in those states without further testing. Virginia's certification requirements are "certified" as having met the other states' legal mandates. This allows Virginia businesses to be more competitive and save money in the course of conducting business across state lines.

The only other alternative to this type of certification program (one that requires studying manuals and then testing on such manuals) is one that might follow the provision in 2 VAC 20-51-40 B. This section specifically sets forth procedures to allow a limited number people, who cannot read or understand labels and who intend to apply restricted use pesticide on property in the production of agricultural commodities, to do so without having to take and pass the required examination for Private Applicators. However, this process requires a meeting between the grower, the Virginia Cooperative Extension Agent for the locality where the property is located, and the investigator for VDACS to determine specific knowledge about the crop being treated, the pesticide being used, and all label, environmental, and safety issues associated with the pesticide's use. This is a very time-consuming process that takes several hours for each person involved. To date there are less than 6 such persons certified under this section of the regulation. To implement a similar program for all of Virginia's 15,000 plus applicators would be both impractical and economically prohibitive. It would also require changes in the statute, specifically § 3.1-249.27 and § 3.1-249.52 through § 3.1-249.54.

**Public comment**

*Please summarize all comments received during public comment period following the publication of the NOIRA, and provide the agency response.*

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No public comments were received on this regulation either during the comment period nor at the formal public hearing conducted by the Pesticide Control Board on October 20, 2005.

**Family impact**

*Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.*

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Unless otherwise discussed in this report, this regulation has no impact upon families.

**Detail of changes**

*Please detail all changes that are being proposed and the consequences of the proposed changes. Detail all new provisions and/or all changes to existing sections.*

*If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all changes between the pre-emergency regulation and the proposed regulation, and (2) only changes made since the publication of the emergency regulation.*

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For changes to existing regulations, use this chart:

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
2VAC 20-51-10	NA	Several terms are listed for definitions that are not used.	The amendment deletes the definitions for “adjuvant”, “nontarget organism”, “reentry interval”, “synergism”, and “unreasonable adverse effects on the environment.”
2VAC 20-51-10	NA	Definition of “Commercial Applicator not for hire”	The amendment simplifies the wording in the definition.
2VAC 20-51-10	NA	There is currently no definition of a “competent person” for the purposes of this regulation.	The amendment adds a definition of what constitutes a competent person. This term is used in 2VAC 20-51-10 under the definition of “Under the direct supervision of.”
2VAC 20-51-10	NA	There is currently no definition of a “Registered technician not for hire.”	The amendment adds a definition that describes this class of applicator, and parallels the definition of a “Commercial applicator not for hire.”
2VAC 20-51-10	NA	Definition of “Under the direct on-site supervision of” simply states that the supervising applicator must be physically present on the property upon which pesticides are being applied.	The amendment states that the supervising applicator, in addition to being on the property being treated with pesticides, must actually be in constant visual contact with the trainee as he is making the pesticide application.
2VAC-20-51-20.B.1.	NA	Day-care facilities are not mentioned as a site where pesticide applications need to be certified if they are not for hire applicators.	The amendment includes “day-care facilities” as one of the areas where commercial applicators not-for-hire must be certified in order to use any pesticide. § 3.1-249.53.D. of the Code of Virginia requires that commercial applicators not-for-hire who apply pesticides in day-care facilities be certified. This requirement was inadvertently left out of the current regulation.
2VAC-20-51-20.C.	NA	Refers to “the use of any pesticides”	The amendment corrects the wording to “the use of any pesticide.”
2VAC 20-51-20.D.	2VAC 20-51-20.D.2.	Under the process for obtaining certification, it is implied that an application needs to be completed but is not stated here.	The amendment includes the specific requirement of completing and submitting an application for certification to the Commissioner.
2VAC 20-51-20.D.2.c.	2VAC 20-51-20.D.3.c.	States that following a failed exam the application must be accompanied by the certification fee again.	The amendment simply states that the fees to be paid must be only as stipulated by the fee regulation; a fee is not necessarily required on the second attempt since the fee regulation does not require that per se.
2VAC 20-51-20.E.	NA	Makes reference to “business license”; states that “Persons” may appear before the board to explain why they should not be	The amendment inserts the word “pesticide” before “business license” to clarify which type of license revocation will be considered and inserts “Such” before “persons” to clarify which persons may appear before the board.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
		denied certification.	It also refers to the Virginia Pesticide Control Act that sets the considerations that the Board must weigh before deciding to deny, suspend, revoke, or modify and certificate or license.
2VAC 20-51-20.F.	NA	States that people cannot apply pesticides until certification has been issued by the Commissioner.	The amendment clarifies that in order to apply pesticides, people must have taken and passed the category-specific exam for each category in which they wish to apply pesticides. They cannot apply pesticides in multiple categories by taking only one category-specific exam.
2VAC 20-51-30.B.2.d.	NA	States that fees must be paid as determined by regulations promulgated by the Pesticide Control Board.	This amendment specifies that the fees are described in 2VAC 20-30.
2VAC 20-51-40.B.	NA	Refers to a consultation with the Virginia Cooperative Extension Service agent.	This is an amendment to better describe the conditions under which an illiterate person might be granted a certificate and to apply the proper name for agents; it is now "Virginia Cooperative Extension agent." The word "Service" has been dropped.
2VAC 20-51-50.A.4.	NA	States that the applicant must take the Registered Technician exam within 90 days.	This amendment makes it mandatory that the Registered Technician exam must be taken within 90 days of when a person has been hired or transferred into a position that requires the use of pesticides. Also, the process to follow if an examination is failed is referred to by section number (2VAC 20-51-20.D.3.).
2VAC 20-50-B.	NA	Current language allows commercial applicators to proctor Registered Technician examinations.	This amendment repeals the language allowing Commercial Applicators to proctor the Registered Technician examinations. New language details the additional training required of a Registered Technician when he wants to work in a category that is different from the one in which he received his original training.
2VAC 20-51-70.A.5.b.	NA	Current language states that this category applies to people using marine antifoulant paints containing TBT or other pesticides.	This amendment brings the regulation into compliance with 1995 changes to the Pesticide Control Act that requires certification only when applicators in this category are applying TBT or other restricted use pesticides (not required for general use pesticides).
2VAC 20-51-70.A.	2VAC 20-51-70.A.13.	There is no "miscellaneous" pesticide applicator category.	This amendment establishes a "Miscellaneous" category to allow the Pesticide Control Board to certify applicators when using pesticides (or new use patterns)

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
			that have been recently classified as Restricted Use by the U.S. EPA but are not covered by current certification regulations. If this is not allowed, there might be many applicators and businesses that would no longer be able to legally apply such pesticides until the certification regulations were amended through the APA, which could take 1 ½ to 3 years.
2VAC 20-51-90.B.6.	NA	Current language describes adverse environmental effects as one of the factors that potential applicators must have knowledge of to be qualified as a pesticide applicator.	The amendment stipulates that the required knowledge about environmental adverse effects refers specifically to those resulting from the application of pesticides.
2VAC 20-51-100	NA	Current language states which manual must be the basis for pesticide applicator training.	This amendment is a language housekeeping change only.
2VAC 20-51-160.A.	NA	Current language says certain violations “shall” constitute grounds for certificate revocation.	This amendment brings the language for certificate revocation into compliance with the Virginia Pesticide Control Act which uses the term “may”.
2VAC 20-51-160.B.	NA	Current language states that a person’s certificate shall be suspended if a civil penalty is not paid within 60 days according to a section of the Code of Virginia.	This amendment uses clearer and more easily understood language to explain that the suspension of a certificate is automatic for non-payment of a civil penalty within 60 days and the process for such a suspension.
2VAC 20-51-170.D.6.	NA	Current language lists bodies of water as one of the data required to be reported when pesticide accidents or incidents occur.	This amendment narrows the scope of which bodies of water need to be reported in a case of pesticide accidents or incidences.
2VAC 20-51-200, 200.A. and 200.C.	NA	Current language states that commercial applicators not for hire keep records of certain pesticide applications.	The amendment requires Registered Technicians not for hire to keep records of pesticide applications as well as commercial applicators not for hire.
2 VAC 20-51-210	NA	Current language states that commercial pesticide applicators not for hire must keep records of restricted use pesticides used.	The amendment requires all applicators not for hire to keep records of all pesticides used, not just those classified as restricted use.